

THE CASE OF WM. LIVINGSTON

AND

FIFTEEN HUNDRED OTHER CITIZENS OF LOWELL,

PETITIONERS FOR

A CROSS RAIL-ROAD

FROM

LOWELL TO ANDOVER.

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ARGUED BEFORE A JOINT COMMITTEE OF THE LEGISLATURE  
OF MASSACHUSETTS—JANUARY, 1845.

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ARGUMENT OF E. H. DERBY, ESQ.

COUNSEL FOR THE PETITIONERS,

IN REPLY TO MR. WEBSTER.

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BOSTON:  
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1845.

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COUNSEL FOR WM. LIVINGSTON, } E. H. DERBY, Esq.  
AND ALS. . . . . }

COUNSEL FOR REMONSTRANTS— } CHAS. G. LORING, Esq.  
THE BOSTON AND LOWELL R. R. CO. } HON. DAN'L WEBSTER.

COUNSEL FOR HOBART CLARK, }  
AND ALS.—PETITIONERS FOR AN } B. R. CURTIS, Esq.  
ADVERSE ROUTE,—ADOPTING TWO }  
MILES OF THE BOS. AND LOW. R. R.

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## ARGUMENT.

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MR. CHAIRMAN AND GENTLEMEN OF THE COMMITTEE :—

THIS case as presented by our opponents is the great case of the Session and the State ; it involves not only the claim of the petitioners, but the question whether the progress of Rail-roads is to be arrested. It involves the principles which are to guide the legislation of Massachusetts. It demands your cool and dispassionate attention, and when I consider that I encounter alone and unaided the ablest counsel of the State, sustained by the great champion of the North, I may well feel in so unequal a contest, that even defeat will not be inglorious. That there will be honor in falling by the sword of Hector and the spear of Achilles.

We come here to invade the rights of no one, we come to infringe no charter. The constitution and the laws are our panoply and our shield as well as those of our opponents. The language of my client, Livingston, as proved by the defendant's witness, " that he would abandon his case if it conflicted with the Lowell charter," is mine ; and if I cannot place it within the pale of the law, I ask you to reject it. I shrink instinctively from the invasion of private rights.

The Lowell Rail-road has placed its case on the footing of right, and on that footing only ; it makes no appeal to your magnanimity or liberality. It stands upon mere naked right. It is therefore of the highest importance to ascertain the nature and validity of that right. If it exists, to treat it with respect, but if assumption is advanced in place of title, if pretension takes the cloak of justice, let the truth stand forth,



and let us not forget that under the mask of conservatism, doctrines may be urged as subversive of all improvement and as injurious to the rights of others, as the effects of the wildest radicalism.

The distinguished counsel of the Remonstrants commenced his discursive speech of yesterday, by citing an extract from a newspaper in favor of the cross-road. He told you it was designed to influence the opinion of the public; he ascribed it to the petitioners or their attorney, but he subsequently disclaimed all reference to their counsel. It did not emanate from us, it was but the expression of the press in favor of the measure we advocate. For it we are not responsible. The voice of the press sustains us of its own accord, and such is the character of our claim, that you may well expect the trumpet-tongues of the press will ere long be unanimous in our favor.

Again, the opposing counsel suggested that Livingston & Co. were but the subordinate agents of the Boston and Maine Rail-road. The charge rests upon no evidence. Having had the honor last year to represent that company before your Committee, it is my duty to say they stand aloof from the contest, and give no countenance to any one; they have neither retained Livingston nor his counsel to advocate this charter.

The Boston and Maine Rail-road is a great line. Delighted at its escape from vassalage, busy in opening its track into the centre of Boston, giving to its patrons the best terminus in the city, engaged in constructing a new line through the considerable towns of Reading, North Reading, Stoneham and Malden,—towns left almost desolate by the march of improvement,—it does not move in this matter.

It enjoys a good reputation both at home and abroad, for the frugality with which it has been administered, and for the moderate tolls it has established. The people upon its borders may well call it “our road,” for it is emphatically the road of the people. It has been conducted as a trust for their benefit, and enjoys the confidence it merits.

It is now prosperous and independent; derives ample resources from its own traffic, and looks alone to the development of its proper business. With the reputation it has, it

is not, however, surprising that others less favored should seek to intersect it.

The distinguished counsel informs you, that in our opening, the point was made, that favor had been shown to the Lowell factories. We are not aware such point was made in our opening. We ask not a road to Boston, and have not thought it essential to our case to go into this inquiry, although there is a strong feeling on the subject at Lowell.

The distinguished counsel has also seemed to imagine, that we wage war with the Corporations of Massachusetts. We enter into no such crusade. He has given you a vivid picture of their progress and their usefulness. In his views upon this subject we most cordially unite; we agree with him too in his strictures upon another class of Corporations, which he condemns. I allude to the ancient Corporations with exclusive privileges, like the Turkish and East India Company, which have become alike unpopular on both sides of the Atlantic. They long bore like an incubus on the trade of England. Let us see to it, that the Rail-road Companies of our State do not assume such a character or incur the odium which is its necessary attendant.

Let us not permit them to arrogate a power or advance pretensions at variance with our Bill of Rights, our Legal Decisions, our History and our Traditions.

Does the learned gentleman believe we would kindle the jealousy of the poor against the rich? The rich have their privileges, let them enjoy them; but if under the name of franchise or any other imposing title, they assume a power not conferred by the laws, they must not be surprised if their rights are disputed. He compliments our State for its conservatism; but true conservatism consists as much in preserving our institutions and rights as in repelling innovations.

The doctrine is advanced by the distinguished counsel, that *new railways are not to be favored*. He fears an excess of Rail-roads, an infringement of chartered rights, that laudable enterprize may degenerate into mere speculation. He dreads competition, whether direct or indirect, and would banish it from the Rail-road world. He tells us we shall soon have claims for Rail-roads to every village, and would resist them at the outset. He ridicules the idea of a petty



Rail-road asking the State to clothe it with its prerogative and power to divest the owner of his land and tenements ; and gives force to his ridicule by a story of a little officer, who told his assailant, "when you shake me, you shake in me the whole State of Massachusetts." And is there not, Mr. Chairman, quite as much truth as wit in the illustration? If the State denies protection and equal rights to her humblest villagers, if she defers to the powerful and disregards the weak, will she not be shaken to her centre?

Are the positions taken by the gentleman correct? Are they worthy of his genius or his intellect? Are they not the promptings of the fee'd attorney, rather than his own conceptions? Do they not originate in a partial view of the condition of our State and the advance of Rail-road science? Do they not lead to a narrow and illiberal policy, unworthy of Massachusetts, the great pioneer in improvements, who, if she be conservative, is also a bright exemplar of enterprize and rapid advance in manufactures, navigation and rail-roads.

If these doctrines rest on vague conjecture or assertion, and not upon the basis of reason, no degree of talent, backed although it be by an array of wealth, can sustain them.

What is the true foundation of our Rail-road system? Does it rest upon the obsolete doctrine of exclusive right, a vested interest in the public travel, or upon the broader, safer basis, the surer tenure of the public good?

Are not RAIL-ROADS TRUSTS for the benefit of the public?

Lord Bacon says, three things confer greatness upon a country ; a fertile soil, busy workshops, and easy communication for men and commodities.

Without easy communication, fields and shops are valueless. Among the first and most important powers and duties of government are those to facilitate intercourse, for the cost of transit enters into the value of whatever is produced and whatever is consumed.

The right of creating ways has, like the power to tax, been placed by eminent statesmen and jurists among the essential if not inalienable rights of government. Let us follow the settlers into the forest. For what do they first associate? Is it not to form a bridle path to the borders of civilization? As

they advance, do they not choose surveyors who widen it to a town road,—then commissioners who make the county road? The turnpike, the canal, and the improved highway,—the modern Rail-road,—follow. One of the great objects of association is to provide highways, and the trust and duty to provide them devolves on government.

Some nations, like Belgium, make Rail-roads, for the people, raising money at a low rate, and charging a moderate toll to defray interest and charges; some delegate the power and the trust to subordinate agents, to associations, as England does her turnpike trusts. This is the practice of Massachusetts. For years connected with public improvements, both as director and counsel, it has been my fortune to advocate and to receive many charters, and they have been claimed and granted as trusts for the public, and upon the plea of public good.

What is the plea? The State is apprized of the progress of art, that the cost of transit is to be reduced, speed to be accelerated, comfort promoted, the public accommodated, and an impulse given to commerce and manufactures.

The State is asked to delegate its power, to authorize the grantees to assume its prerogative to take land for the benefit of the public. A compact is formed between the State and the Company, by which the latter assumes for the State the trust and duty of constructing and equipping with vehicles a highway which shall accommodate the public.

The Company, by the terms of their compact, are to receive their commission as trustees in the shape of tolls, not to exceed a limited rate and dependent on the inducements held out to the public, while the State reserves the right of recalling the trust and ultimate and absolute ownership for the benefit of the ward, the public.

To use the language of Judge Upham, of New Hampshire, “the companies are merely agents for the State discharging a public trust.” The Rail-road, says the court in the case of the Raleigh and Gaston Rail-road Co. *vs.* Davis, 2 of D. and B., North Carolina Reports, “is a highway as to the public, is taken for the public use, and vested in the Company to accomplish the purposes of the act, which are the public accommodation.”



In the *State vs. Rives*, recently determined in Virginia, the court decide "the Company has a private incidental and secondary interest to be so enjoyed as not to defeat the paramount object essential to the creation and existence of the road, the public right."

By the grant of the charter, no title is conferred to the passengers and freight in the district traversed by the Rail-road, they are as free as the air of heaven.

The distinguished jurists, John Davis and Marcus Morton, both recipients of the highest honors of the State, and the leaders of the two great parties of Massachusetts, have expressed one opinion upon the subject of vested rights, and they have placed their opinions on record; they agree that "there is no right or interest in the public travel which can be the subject of a legal claim." Neither a Turnpike, a Rail-road or a Bridge has any vested interest in the public travel.

If there ever was a question upon this point, it was determined conclusively in favor of the public in 1829, after the most elaborate argument in the case of the Warren and Charles River Bridge. That case on appeal, was sustained by the Supreme Court of the Union, and is the established law of the land.

Where then are the vested and chartered rights to which the gentleman refers? Where the exclusive privilege of our Rail-roads to be endangered by competition? Is the trustee for the State greater than the State itself? the creature above the creator? and is the servant to bid defiance to his master?

No. The existing Rail-roads were granted upon the plea of the public good and for its promotion, and when that good demands more, upon the same plea, more are to be granted.

But it is gravely urged *small* Rail-roads are not to be created, that there is no public exigency which calls for them. Why distinguish the great from the small? Have the Granite Rail-way at Quincy, the Ice Rail-way at Charlestown, the Nashua, the New Bedford, and the Taunton lines conferred no benefits on the country? Has not England built short as well as long Rail-roads, and do they not stand on the same footing; do we not now require more short than long lines to perfect our system?



And as respects the exigency that calls for them, has not Massachusetts authorized a bridge from Breed's Island to the main across navigable waters, to accommodate three persons,\* and does not a greater exigency arise in every case in which Rail-roads are demanded.

There is no mystery about a Rail-road, it is after all but an *improved way*, and if the business of the line will sustain it, the claims for a franchise will stand upon the same footing as a claim for a town or county highway.

And let me inquire, is the community in danger, is speculation so rife that no new Rail-road is to be sanctioned? What rocks, what wrecks, what beacons mark the path of the Rail-road system to warn the public of their danger? Is the fact disputed, that during the past year every Rail-road in Massachusetts, notwithstanding the improvidence or want of skill that may have attended its construction, has earned more than the current interest of capital? And is it not proved by the report of the Lowell Rail-road, the evidence of the remonstrants, that in eight years, many of them years of depression, the revenue of the Lowell Rail-road has more than doubled, that the increase of traffic is twelve per cent. per annum.

What is the present condition of Massachusetts? Is she advancing in wealth and population, is she stationary or receding? Her commerce, her navigation, her manufactures and her Rail-roads are prosperous and progressive. Her manufactures are giving an annual return of more than twenty per cent. In 1840, her valuation was \$300,000,000, it bids fair in 1850 to approach \$500,000,000. By the same period, her population growing with an unprecedented vigor in her great capital, the focus of Rail-roads, and in her countless villages bids fair to show 1,000,000 people in the narrow compass of 7500 square miles. Compare her as she is prolific only in ice and granite, both candidates for carriage by Rail-road, with the fertile extensive regions of Michigan and Ohio. The valuation of Michigan with 250,000 people is but \$25,000,000; the valuation of Ohio with 2,000,000 less \$150,000,000.

\* See Commonwealth vs. Breed, 4th Pickering's Reports, p. 460.



Observe the silent progress of our State as the Rail-road system moves hand in hand with the arts, manufactures, improvement and refinement. Freights and passage fall, industry and skill, the capital of the poor man, are cheaply borne to their best marts, the centres of production. A stimulus is given to manufactures, another to commerce, another to navigation.

The great city expands, three thousand houses rise in a single year within its environs. It requires more supplies. The new demand creates other Rail-roads.

Is this life-giving system to be arrested? Let us look abroad and observe England, sagacious England, cover Lancashire and Yorkshire, the flourishing seats of her manufactures, the very pivots of her power, with a perfect net-work of Rail-roads, and mark the result; an accumulation of capital now estimated in the public prints at more than £1,000,000 per week.

While wealth and population have been and are progressive in Massachusetts, has the Rail-road system itself been stationary? Have not engineering, cars, locomotives, and construction kept pace with other improvements? The average cost of the principal Rail-roads in this State, begun ten years since, was not far from \$60,000 a mile. Surface roads are now built, improved engines, cars and superstructure render double tracks less important. The result is, the average cost of our new lines does not materially exceed \$20,000 a mile. Take, for instance, the Fitchburg, the Boston and Maine, the New Bedford and the Concord, and probably the Hartford and Springfield, and Fall River.

In the cost of running, there has been nearly an equal improvement. When the Chevalier de Gerstner came here some seven years since from Austria, to investigate the cost of running our Rail-roads, he reported that the average cost was one dollar per mile run. In 1844, the cost of running at least two modern Rail-roads,—the Boston and Maine and the Fitchburg,—has fallen to two shillings per mile run, or about \$1,000 for each mile of Rail-road. What then is the result? Let us introduce a little arithmetic.



Assume a cost of the first Rail-roads at \$60,000 per mile, the annual interest is	-	-	-	-	\$3,600
Set the running expenses at \$1 per mile, and the same number of miles run as on the Boston and Maine last year, the annual cost is	-	-	-	-	3,000
Put the depreciation at one per cent. on the capital, \$60,000,	-	-	-	-	600
The aggregate is	-	-	-	-	<u>\$7,200</u>

Take a mile of modern Rail-road assumed to cost \$20,000; the annual interest is	-	-	-	\$1,200
Annual cost of running at \$1,000 per mile,	-	-	-	1,000
Depreciation of capital one per cent.,	-	-	-	200
Aggregate one third, or	-	-	-	<u>\$2,400</u>

But while thus the annual charge has fallen to a third, the business has doubled, so that the ratio now will be as 12 to 72; and the legitimate inference follows, that the reasons for extending our Rail-road system have increased in eight years at least six fold, while the basis of the Rail-road system has extended in even a greater ratio.

And why should not commerce and art continue to advance, until this GREAT WORK OF HUMAN AMELIORATION, which reduces the actual cost of transit from seventy to ninety per cent. shall reach the humblest village in the State, restoring to deserted lines the animation they have lost, giving back to stores and hotels their departed value, giving birth to new settlements, bearing the express-man daily, if not hourly, with the newspaper, the letter, and the package to the doors of the humblest inhabitant?

Let those who are not accommodated be accommodated. The result which our great Orator named to deprecate, is the fervent wish of my heart. Let us at the outset resist the doctrines, from whatever source they spring, that each existing line is to be a harsh and rigid monopoly, a barrier to all improvement unless consistent with its private interests.

Such doctrines are dangerous, they tend to revolution; they are at variance with our institutions and our history; they can be sanctioned neither by the living nor the dead.

The parties in, may, as Mr. Webster expresses it, attempt to keep other parties out, but they will be met by the spirit which animated Hampden, Vane, and Winthrop, when they questioned the constructive power of an oppressive king. By the spirit that resisted the stamp act, and the tea tax, springing from the constructive power of a distant parliament. The sons will be true to the principles of their sires.

And here let me pause for a moment to notice the comments of the learned counsel on the case of the Charles River Bridge. It is natural for him to regret the result, for he fought for years the battle of the vanquished—and whatever may be our sympathy with a Company who received \$1,250,000 return on an outlay of \$40,000, let us not forget that the final decision was advocated and sustained by many of our most distinguished and enlightened jurists, by Wilde, Morton, Fletcher, Davis and Greenleaf, and is now the established law of the State and of the Union.

Does the distinguished gentleman hope to reverse the decision; to force up our Rail-road stocks for the benefit of capitalists to a premium of two or three hundred per cent., like the shares of the Charles River Bridge. Would not such a course lead to the *wildest speculation*?

But he tells you unless you recognize the rights he ascribes to Rail-roads, you will deter the timid capitalist from adventure, and no roads will be built.

Is this position tenable? Has not our whole system of Rail-roads grown up since the decision of the Charles River Bridge case? It was decided here in 1829, at Washington, in the fall session of 1836. Has it prevented the rapid, and healthful growth of Rail-roads?

But he informs you of a capitalist, a great manufacturer, who, after the grant of the Boston and Maine Extension, sold out all his stock in the Lowell Rail-road; and well may this be so, for there were facts relating to that Rail-road which came to light at the hearing, which might well influence his action, for he is one of those sagacious men who sees the difference between a new mill cheaply built, with new



mechanism, modern improvements and low salaries, and the reverse, and guides his investments accordingly. When the Public is enlightened, is it surprising it should discriminate? And why is the cost of running higher on the Lowell than other roads? Has it kept pace with modern improvement? For more than half its business it furnishes little more than a track and motive power. It neither loads nor unloads the goods, nor supplies cars for the freight and passengers passing between Boston, Andover, Nashua and Concord.

But there is another topic discussed by the distinguished counsel—it is the danger of competition,—competition from which the timid capitalist is to shrink like the child from the cold bath, or the deer from the Anaconda! Is this a principle so full of danger?

It would doubtless be pleasant to the bar, to the manufacturing interest, to the hotel keeper to have no competition. The demand would at least equal the supply, profits would be higher, returns more remunerating. But if the bar had a strict monopoly would the public be as well or as cheaply served. If one manufacturer had an exclusive right to furnish gingham, and another calicoes, would the articles be afforded as low, or compete as well with the foreigner in a distant market. If the City Tavern had a strict monopoly of travellers, would they have fared as well as they now do at the Tremont or the United States, and does free competition prevent the growth of the bar, the factories or the hotels?

A few years since we had but one line to New York, we now have six, and when the Fall River line is opened, we may have seven. Are the facilities of travelling less or the prices higher than they were before? A few years since the Norwich line began to compete with the Providence. What was the result? The business was divided, the Providence Rail-road was compelled to cultivate its local traffic, to open branches. It reduced its freight to Providence one half, and gave to Boston the business of Providence, until then dependent on New York. And what has been the result? The Providence Rail-road earned last year over nine per cent. And suppose a little indirect competition should reach the Lowell line, might not some benefits follow? The candid engineer, Mr. Storrow, concedes there is room for a *little* more



economy. Some reductions perhaps might be effected in salaries, in the cost of repairs now made by the Locks and Canals, some improvements be made in mechanism, all of which would benefit the public. For the State profits by whatever reduces the cost of transit.

New York has tried a monopoly in steamers, but the courts refused to sustain the exclusive right, and what has been the consequence? Each year produces a new flotilla of steamers, surpassing in size, speed and other qualities, all that preceded them. The charges have fallen at least ninety per cent, and if report be true, the steamers, numerous as they are, are enriching their owners. If competition produces such effects, why will it prove so disastrous to Rail-roads?

Capital will not flow into Rail-roads without the prospect of dividends; and if an existing line accommodates the public in the best manner and at a moderate rate, and earns no more than eight or ten per cent. there can be no inducement or adequate motive to throw additional capital into that channel on a new road: and inasmuch as no adequate benefit would result, it would be inconsistent with the public good for the State to allow capital to be sunk in a parallel line. It is doubtless the policy and interest of the State to preserve capital, and sound discretion will dictate liberality to those who best accommodate and are most liberal to the public.

Having thus answered the propositions of Mr. Webster, let us consider the particular claim of Livingston and his associates for the Cross Rail-road from Lowell to Ballard Vale, in Andover, a distance of nine and a third miles.

If ever a case was made for a new Rail-road we make one. The route is easy. The gradients light. The curvature unobjectionable. The estimated cost moderate. The travellers who will annually avail of the line, independent of any who may make a circuit by this route to Boston, and independent of all increase, are proved to be 49,868, being a third more than the number between Boston and Lowell, when the Lowell charter was granted.

The line opens to Lowell an important quarry of granite, and connects it with extensive brick-yards in Plaistow, and it is in proof that Lowell draws annually from distant points



many thousand tons of these building materials, so essential to a rising city.

The line unites the great manufacturing districts of New England, and opens to Lowell a rich agricultural district, while the region around Lowell is poor and unproductive.

The population of Andover is not far from 6000. The population of Lowell must exceed 25,000. The people along the line favor the enterprise, it is sustained by the almost unanimous vote of Lowell, Tewksbury and Andover, by large delegations from those towns, and by a large body of petitioners.

And if there is any spot that may well demand a boon of Massachusetts, or has claims on her gratitude, it is this city of Lowell. The State may indeed feel pride in Lowell, a great and flourishing city, the creation of a day, overflowing with people, diffusing wealth through the country, the centre of manufactures. The fame of Lowell and with it the fame of Massachusetts, have been borne through the Union and the World.

England has given to Manchester *a web* of Rail-roads. Shall Massachusetts deny only *one* cross-road to the Manchester of America, and that one, too, most essential to her progress. Will she disfranchise the city which has the strongest claims on her gratitude?

The State has lent capital to other lines, to insure their construction, and made Lowell responsible for the loan. Lowell asks no such loan, but she asks the mere privilege of building the road herself.

The following Table, in which the evidence as to traffic is condensed, shews the ability of the line to maintain itself.

*Estimates of Revenue from existing Traffic between Lowell and Andover.*

15,035 Passengers, passing in 1844, between				
Lowell and Andover, through Wilmington,				
per estimates of Messrs. Storrow and				
Minot,	.	.	.	\$7,904 16
Freight,	do.	do.	2,400 tons,	2,400

15,300 Passengers, by five lines of stages, including Wilmington and Salem stage, -	7,650
5,000 Travellers by private vehicles, between Andover and Lowell, estimates of Thurston and Minot, . . . . .	2,500
3,333 Travellers going to Haverhill, &c. .	1,666
4,000 " " " Tewksbury, .	1,000
7,200 " " " Reading, Lynn, &c. per Spaulding, in private carriages, .	3,600
Lumber.—Lowell to Andover, 250,000 feet, .	375
Do. Bricks by team, . . . . .	500
Do. Furniture, Lowell and Reading, . .	1,000
	<hr/>
	\$28,595 16
Cross Mail, at \$50 per mile, . . . . .	500
	<hr/>
	\$29,095 16
Increase by proposed Rail-road, of cross traffic, 25 per cent., . . . . .	7,298 79
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	\$36,393 95
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Interest (on cost of Branch Rail-road, \$225,000),	\$13,500
Running expenses, 9 1-3 miles, at \$1000 per mile,	9,333
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	\$22,833

Excess of income \$13,560 95, or 6 per cent. extra.

But it is urged in reply, that no public exigency exists for this line. This exigency is apparent. The circuitous line by Wilmington, of nineteen miles, is uncertain and expensive, occupies twice the time required by the new route, and does not now control one third the business. The expense of running it properly, with an independent train, will be two fold the cost of running the new line, and even then it will not succeed against the stages. Even the Lowell Rail-road seems, by its alliance with Hobart Clark, to concede the exigency. This exigency is daily becoming more



apparent, and the great improvements now in progress at Andover and the new manufacturing city about to rise at Andover Bridge, must have great weight with the Committee.

But it is urged that the new road crosses several streets in Lowell, and cuts some waste land diagonally. Whence comes this complaint?—from the Mayor and Aldermen, the natural guardians of Lowell? No; it comes from a subordinate agent of the Locks and Canals, and from another very disinterested gentleman, Mr. Gray, who enjoys the monopoly of an express on the Lowell Rail-road. Does the intense solicitude he displays for the safety of the little children of Lowell spring from pure philanthropy, or does he entertain the idea that his customers may occasionally get via Andover for one and sixpence a stray package for which he would charge one and ninepence or two shillings? You may easily appreciate the value of his testimony. I need not apprize you, gentlemen, that the Boston and Worcester Road has, for the last ten years, crossed quite as many streets near its Depot, in Boston, without a serious accident. The lots cut obliquely will answer well to deposit bricks, granite, lumber, wood, and hay, and will not be reduced in value.

But it is urged that the land damages in Lowell are underrated. Of this you will judge. Our evidence comes from cool, cautious and discreet men. But let us concede a moderate excess, and the cost of our line will still be moderate.

Again, it is urged, that passengers may take this cross road, and striking the Boston and Maine Rail-road at Andover, nine miles from Lowell, may reach Boston, and thus escape from the Lowell Rail-road, by making a detour, which involves four miles additional distance.

And we are told, the object of the petitioners is to open a new route to Boston. Why, we are asked, if our object is Andover, do we go to Ballard Vale, in Andover, a point two miles south of the main depot?

There are conclusive reasons, as it seems to us, for the route proposed. The village of Ballard Vale is an important point, and will give much business to the line. The country at the north is rough, broken, and precipitous, at least one



hundred feet above the Shawsheen River, which must be crossed, involving much expense and heavy grades. Again, much of the cross travel will direct itself to Reading, Lynn, Danvers and Salem, and save several miles by the route to Ballard Vale, while the majority of travellers from Lowell, who go eastward beyond Andover, will take the Boston and Maine cars, with nearly equal convenience, at Ballard Vale; and if some persons may occasionally take such circuitous route to Boston, such result is not the natural or necessary consequence of the grant, or the main object of the petitioners. And if indirectly this line should attract a chance passenger, or lead to moderate charges on the Lowell Rail-road, such event is not to be deprecated. Even the shadow of indirect competition seems already to have moderated prices on the Lowell line, with great benefit to the public, and with an increase of income. But Mr. Livingston gives you under oath the proper view of this subject. He had some view to Boston at the outset; he had some idea of an indirect and circuitous competition, if high charges were maintained, as they long were, on the Lowell road; but his investigations have satisfied him that the cross business alone will give a generous support to the enterprize.

But is the bare possibility of a circuitous competition to prevent the grant of a cross road, with a sufficient and perfectly legitimate business, particularly when such road is demanded by the wants of the community, and more particularly when the community which require it are daily extending? Other cross roads will be built from Worcester to Nashua, from Reading to Salem, from Bradford to Newburyport, and a great cross traffic take this direction. It is in proof that several hundred tons of flour, flax and wool, from the Western Rail-road, are now annually consumed in Andover alone, which would cross the country with a benefit to the consumer, if proper facilities were afforded.

The general objections to our enterprize have now been discussed; what is the character of those which assume a less fanciful shape, a more palpable and definite form?

And first, the associate counsel of the remonstrants urges the point, that, as the State has limited the net income of the Lowell Rail-road to ten per cent., no sufficient or adequate



reason can exist for constructing another line which may take the same traffic until the income reaches that point, and the State has no constitutional right to grant such new line. This point is not stated in very exact terms. The idea seems to be that the income of one line is to determine the public exigency for another and the right to construct it.

Our answer is two-fold. We take a line of traffic not contemplated by the grantees of the Lowell Rail-road, and which it does not accommodate; and if the amount of tolls is any criterion of right, how can the Lowell Rail-road sustain itself against the claims of the Middlesex Canal, on whose ruins it was erected,—a canal almost side by side to it, with a right to income unlimited by law. The argument might prove too much,—it would prove the charter of the Lowell Rail-road itself illegal. It is *felo de se*.

But what more fallacious than such a standard of right. The net income may never reach ten per cent.,—shrubbery may be planted, high salaries and liberal counsel fees be paid, reductions made to favored parties, or the traffic may be excluded by an oppressive tariff.

The constitutional warmth with which such points may be pressed by the associate counsel, should not give undue weight to the argument. You may remember he said last year, the charter of the Maine Extension would be a violation of law, and he would stake his reputation upon it. The work is nearly done, but the thunderbolt of the law has not fallen. He intimated if such act were passed, he would fly his country,—but he still basks in the sunshine of the Lowell Rail-road.

We come now to the main point of the case, the twelfth section of the charter of the Lowell Rail-road, passed in 1830, which “provides that no other Rail-road shall, within thirty years, be authorized, leading from Boston, Charlestown or Cambridge to Lowell, or from Boston, Charlestown or Cambridge, to any place within five miles of the northern termination of the Lowell Rail-road.”

We are told this clause precludes the State from authorizing the road proposed, because such road at Ballard Vale, *more than nine miles east from the Lowell depot*, intersects the Boston and Maine Rail-road, leading northeasterly from

Boston to Dover, and thus makes a new line between Boston and Lowell.

With respect to facts, there is no material difference.

An air line from Boston to Lowell is twenty-three miles.

The length of the Boston and Lowell Rail-road is twenty-six miles.

The circuit by Ballard Vale from Boston to Lowell is thirty miles.

The cross road and Boston and Maine Extension, as they approach each other, form an acute angle with the point towards Dover.

The Lowell Rail-road lies in the counties of Middlesex and Suffolk. The point of intersection is in the county of Essex, and is on the easterly side of a line drawn from the east side of Charlestown to a point five miles east of the northerly terminus of the Lowell Rail-road in Lowell.

Does the clause recited forbid our charter?

If the public faith has been plighted, however unwisely, let it be kept inviolate. If legislators, commissioned for a brief term of service, have legally bound the State for a longer time by an imprudent contract—if they have thus disfranchised towns and cities, let the honor of the State be preserved. I ask nothing that shall bring a blush to your cheeks when your native State is mentioned, but I ask that no array of talent, no forensic power or legal reputation retained by liberal fees in the service of the remonstrants, be permitted to sway or pervert the judgment.

If the clause in question gives an exclusive right, it is expressly limited and defined. The language is explicit, and is not to be expanded by construction. It forbids a parallel line within a prescribed distance, but it does not forbid a route from Boston to Dover, through towns not touched by the Lowell Rail-road, neither does it forbid a cross line from Lowell towards Newburyport, intersecting the former more than nine miles from Lowell.

What is the true rule of construction?

Public grants are to be construed strictly.—*United States vs. Aredondo*, 6 Peters, 737.

Nothing passes by implication. Expressio unius est exclusio alterius.—*Jackson vs. Lamphire*, 3d of Peters' R. 289.



“The rule for construing the charter of a canal is in favor of the public and against the adventurers. They can have nothing but what was clearly granted to them.”—*Stourbridge Canal Co. vs. Wheeley*, 2d Barnwell & Adolphus, 792.

“A grant made by the public is not to be extended by implication. It shall not enure to any other intent than that which is precisely expressed. Improvement is the natural result of a liberal competition.” 7th of Pickering, 416.

“It is the right and duty of all governments, especially those over new countries, to facilitate intercourse by new avenues.

“And if estates on other lines suffer, they have no claim for redress.

“Their tenure is on this contingency.

“The loss is like the loss of the tradesmen by change of fashion. *Chief Justice Parker*, 7 Pickering, 514.

“In doubtful case, it seems to me a sound and wholesome rule of construction to interpret public grants most favorably for the public interests.” *Judge Wilde*, 7 Pickering, 462.

“Those who seek to impose burthens on the subject, should take care their claim rests on plain and unambiguous language.” *Leeds and Liverpool Canal Company vs. Hustler, Barnwell & Creswell*, 424.

“It would be a singular spectacle, if, while England and English Courts are confining in the narrowest limits the spirit of monopoly and exclusive privilege, we should enlarge them, and construe a statute more unfavorably to the public and the rights of the community, than it would be by an English Court.” *Chief Justice Taney*, 11 Peters, 547.

The cases cited are of the highest authority, and are conclusive that the clause in the Lowell charter which favors monopoly, must be construed strictly, cannot be extended by implication, and, if ambiguous in any respect, must be interpreted in favor of the public.

The Lowell road receives a charter embracing the clause in question. What rights does it confer? Can there be any uncertainty on these points?

*First.* It confers the right to build and run a Rail-road.

*Second.* It authorizes a toll to be charged to those who

choose to use it, but it does not require patronage from any one who prefers the canal or any other route.

There is nothing compulsory upon the public. It vests no title in the public travel, and none can be drawn from implication or enlarged construction.

*Third.* The clause in question stipulates that the State will not for thirty years authorize another Rail-road *leading* from Boston or its suburbs to Lowell, or any point within five miles of the Lowell depot. Under this clause the State might at once have authorized a Rail-road from Boston to the Merrimac, striking it five miles east of Lowell. An air line in such direction would not exceed twenty-four miles in length. A cross line from this point to the Lowell depot, five miles and a few rods long, would form an angle with the new line less than a right angle, and would incline a little towards Boston. By such line and cross line the distance from Boston to the Lowell terminus would be less than by the two lines intersecting at Andover; but could such route, running beyond the northern terminus, and thence converging towards Boston, be called a route leading from Boston to Lowell?

But it is said the Cross-road and Boston and Maine Extension, actually *lead* from Boston to Lowell. Is this correct? One of them leads from Boston through Malden, Stoneham, Reading, South Reading, and Andover, towards Maine,—is this a road leading to Lowell?

The other leads from Lowell towards Newbury and the sea, and will ere long form part of a continuous line in the same direction; *it* points also away from Boston.

But it is urged, the two combined *lead* from Boston to Lowell, because “lead” is defined to mean “conduct,” and this route may conduct passengers from Boston to Lowell.

Johnson defines “lead,” when applied to roads, to mean “to pass,” and *passing in a direction to*, is doubtless the true definition.

But were the definition of our opponents true, the one line would lead the passenger from Boston to Dover, the other from Lowell to Newbury. The passenger must, in either case, turn a sharp corner, change his front and his direction before he could enter a route leading towards Lowell or Boston.



But it is urged, lower tolls on the new lines might *lead* him, and on cheap lines such tolls may be adopted. Low tolls might exert an influence, but low *tolls* are a loadstone not forbidden by the clause in question. The clause confines itself to *roads*, not *tolls*. The roads, not tolls, must lead the traveller. The Legislature has done nothing to discountenance moderate tolls, and we are yet to learn that such is their policy. We are also yet to learn that such tolls are the least productive.

Does the clause forbid, in express terms, a road from Boston to Andover, or another from Lowell to Andover intersecting more than five miles from the Lowell terminus? Does it forbid, in express terms, cross lines from Lowell? If it does not, are we to extend its meaning by implication, or bend a term, which, if not clearly in our favor, is at most ambiguous, into a construction restrictive of public right.

Such construction is not warranted by legal principles. It is not warranted by cotemporaneous exposition, for proof was offered that when the charter was on its passage through the House, it was conceded by its authors, the clause would not restrain Rail-roads from Boston to points like Concord on one side, Andover on the other, and thence to Lowell.

But it is urged that in this view the clause gives no effectual protection to the Lowell Rail-road. Surely it does. It gives to it a protection of four miles in distance, on a route of twenty-six, a protection of about fifteen per cent. in point of time and distance, with all the benefits incident to the first choice of route and gradients. A preference of five per cent. would make the fortune of any merchant. Will not fifteen and the first choice of ground protect the Lowell Rail-road?

But for the purposes of the argument, concede that the view we take will not protect it. The Lowell Rail-road has chosen to stand on the ground of strict right, upon the letter of the bond; and if, by the letter of the bond, it cannot claim beyond "the pound of flesh one jot of Christian blood," is the State, whose power and rights are impugned, to enlarge the penalty?

But our opponents urge, the clause in question gives a patent for a new invention. The Rail-road was no new invention. It had been made at Liverpool, at Stockton and Dar-

lington, and carried passengers and freight at those places. The Quincy Rail-road also was built, and the Baltimore and Ohio was commenced as early as July, 1828. A Rail-road was no novelty. In such a case would a State patent be tenable, or construed differently from a charter restriction?

The Lowell Rail-road Company inform us they rely on their corporate power, they come not as suppliants, they do not ask to be regarded as a beneficiary; and if they did, should the State, as a whole, or the city of Lowell in particular, be charged with the recompense or gratuity demanded.

Is the State to say that no improvement of art shall by any circuit, directly or indirectly, benefit the city of Lowell? Or is the State to assume all losses by defects in construction or management, a liability *not specified* in the Lowell charter? If the State has placed a giant on the direct route to Lowell, is he to close every other avenue to the city? Is he to sweep his mace over both the counties of Middlesex and Essex, to interdict all improvement, to assert a property in those who travel, and reduce them to feudal vassalage?

But it is urged by the counsel of Hobart Clark and others, the able ally of the Lowell Rail-road, that their line from Lowell to Andover should be preferred; that it avoids crossing the streets of Lowell, adopts two miles of the Lowell Rail-road, and strikes the Boston and Maine line at the South Parish, in Andover, and *increases* the distance too from Lowell to Boston via Andover, to thirty-four miles.

Our objections to this are manifold. It originates with Mr. Storrow, the agent of the Lowell Rail-road, and the six individuals who claim it, and their counsel are in close alliance with the Lowell Rail-road. Mr. Clark, in particular, served it last winter, for weeks, before the Legislature. This route will be dependent upon the Lowell Rail-road, which may control it at pleasure, by restrictions as to hours, engines, and use of track, to say nothing of a *guaranty* that no passenger be permitted to go south from Andover, which is suggested by their counsel.

It runs for two miles in Andover, nearly parallel to the Boston and Maine Rail-road, at an average distance of less than half a mile, apparently for the purpose of avoiding a junction, and this, too, over a rough country, and with a



gradient of fifty-three feet to the mile. Such gradients are not usually favored by engineers.

But if you cannot grant the line we prefer, restrain us to this ! We ask it for the people of Lowell, and who will manage it better than those most interested in its success ?

Our petition and our notices cover both lines, and *no legal* objection to our claim to either can be interposed with success. If you grant us the latter line, however, permit us to pass over two miles of the Lowell road, on the double track, at a fair toll, and with the branch engines, as is common in England, or the grant will be unavailing.

And we may well demand this charter for Lowell. The associates of Hobart Clark inform you they regard it as no considerable boon, while the Lowell road opposes to it no very serious objections. It at least concedes *this route* does not lead from Boston to Lowell.

And here let me rest our case, and commend it to your cool and dispassionate consideration. It may be important as a precedent ; it involves within its principles many other branches essential to the prosperity of the country, including the Worcester and Nashua line, which turns on the same point. It involves the progress of Rail-roads. If you reject this you must reject many more. May your decision comport with justice, with the rights of the public, and the interests of Massachusetts.

## P O I N T S .

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1st Point. The Branch Rail-road proposed by Livingston & Co., is a cross line of great public importance, connecting Lowell, Nashua, Manchester and Concord, and ere long to connect Worcester, New York, and the West with Andover, Reading, Haverhill, Salem, Newburyport, Exeter, Dover and the East.

2d. The cross traffic, independent of the business between Lowell and Boston, will pay the cost of running the line and an interest of more than eight per cent. on the proposed outlay, and greatly benefit Lowell by introducing bricks, hay and granite in very large quantities at reduced prices.

3d. The line proposed, as compared with the circuitous route by Rail-road now existing, involves a saving of eight miles in distance, from half an hour to an hour in time. Certainty in place of uncertainty in the connection is essential to transfer business to the Rail-road from five lines of stages now running, while the saving in running expenses, the granite quarry and local business of Tewksbury, and the business to be diverted from stages, will pay a large interest on the outlay.

4th. That it will be the true policy of the State to entrust this line to the citizens of the towns most interested therein, and not to permit one Corporation directly or indirectly to monopolize two of the most important outlets from Lowell to the South and East.

5th. That the line proposed by Livingston and others, by striking the Boston and Maine line at Ballard Vale, best accommodates the travel between Ballard Vale, Reading, South Reading, Lynn, Salem and the city of Lowell.

6th. That the sole object of the exclusive privilege set forth in the charter of the Boston and Lowell Rail-road was to prevent a direct *parallel* road from being run between Boston and Lowell within the limits prescribed, and not to pre-



vent branch Rail-roads from Lowell being made to intersect other Rail-roads running from Boston to points outside of such limits.

7th. That there is in such charter no compact between the State and the Boston and Lowell Rail-road Co. that such a branch as that now proposed should not be built.

8th. That the intersection of the Boston and Maine Rail-road by such branch, is no violation of such compact if it exists, inasmuch as the Boston and Maine Rail-road lies without the limits defined in the Lowell charter, and the intersection is outside of the line.

9th. That such clause in the charter is to receive a most rigid construction as adverse to the general policy of the State and its interests, and favoring a monopoly to which our institutions have ever been hostile.

10th. The principle that such grants are not to be extended by implication, is the settled law both of England and America.

11th. That all grants by the State are to be construed most favorably to the State on general principles.

12th. That at the time the clause was introduced into the charter, the cotemporaneous exposition was hostile to the views now taken by the Boston and Lowell Rail-road Corporation.

13th. That the claim of the Boston and Lowell Rail-road Corporation is entirely inconsistent with the 6th Article of the Massachusetts Bill of Rights.

14th. That the route of Hobart Clark and others for their branch, by adopting two miles of the Boston and Lowell Rail-road Corporation's line, gives that Corporation an absolute control over the branch, so that by tolls and regulations as to hours, interfering trains, and other impediments, they may render it valueless.

15th. That inasmuch as only a small part of the travel for Lowell eastward, stops at the central village of Andover, while the residue directs itself to Ballard Vale, Reading, Lynn, Salem, Haverhill, Methuen, Plaistow, Newbury, Exeter, Dover, Saco, Portland and elsewhere, both by Rail-road, five lines of stages and private vehicles, the intersection of the Boston and Maine Rail-road can be made at Ballard Vale

with most benefit to the public, and it would be a waste of money to carry the branch two miles further over broken ground, and parallel to the Boston and Maine Rail-road to the central village of Andover.

16th. That in case the Committee should decide against a connection at Ballard Vale as injuring the charter of the Boston and Lowell Rail-road Corporation, that then these petitioners be permitted to make their Rail-road to some point on their proposed line as near as may be to Ballard Vale.

17th. That in case the Committee should prefer an intersection at the central village of Andover, then the petitioners should be permitted to adopt the line of Hobart Clark and others, either in whole or in part, from the point where it crosses the line of Livingston & Co. to such central village.

18th. That the policy recently advocated in parliament by the conservative minister of England, Sir Robert Peele, as the policy of England, viz., to permit improved and cheap Rail-roads to be constructed, connecting indirectly the cities of England already connected by costly lines built in the infancy of this science, and thus asserting the principle that the *public* are legitimately entitled to the improvements of art, while the adventurer in Rail-roads takes with his extra profits the risk of such future improved modes of communication, is the true policy of Massachusetts. And the same reasons now exist for chartering such improved Rail-roads, although opening an indirect competition, as existed originally for chartering Rail-roads on the line of turnpikes and canals.